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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 574

PANHANDLE EASTERN PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, MICHIGAN PUBLIC SERVICE COMMISSION, COUNTY OF WAYNE, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. p. 1a) is reported at 348 F. 2d 340. Opinions 269–B and 344–A of the Federal Power Commission (R. 150–171) are reported at 32 F.P.C. 634 and 636. The Commission's Order Denying Rehearing and Granting Stay is reported at 32 F.P.C. 1123.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1965. The petition for a writ of certiorari was filed on September 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and

Section 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in the circumstances, the Commission erred in denying petitioner's request to reopen the administrative proceedings to take additional evidence on one of the issues involved in petitioner's rate cases.

STATEMENT

The court below affirmed two companion orders of the Federal Power Commission disposing of a single issue remaining in each of two proceedings involving successive filings of increased rates by Panhandle Eastern Pipe Line Company. The earlier filing (FPC Docket No. G–1116) was suspended for the statutory five-month period and, beginning February 20, 1952 (R. 150), those increased rates went into effect and were collected subject to refund until superseded (R. 54) by the other increased rates (FPC Docket No. G–2506). The latter, after five months' suspension, were collected subject to refund through August 31, 1958 (R. 155), when they in turn were superseded by increased rates not here at issue. As a result, although both proceedings, when initiated, involved prospective rates, only the matter of refunds has remained in question since 1958.

The underlying issue in dispute was first raised by Panhandle in the hearing on G–1116. Panhandle sought a departure from the Commission's normal [1]

[1] *City of Cleveland* v. *Hope Natural Gas Company*, 3 FPC 150, 178; *Cities Service Gas Company*, 3 FPC 459, 480–481; *City of Columbus* v. *United Fuel Gas Company*, 5 FPC 279, 290.

and judicially approved[2] treatment of the net revenues (after costs) derived from the extraction and sale of gasoline and other liquid hydrocarbons from its natural gas stream, *i.e.*, applying the net revenues as a credit against the cost of service used to fix the pipeline's rates. To justify a departure, Panhandle contended "that the extraction from its gas stream of natural gasoline and other liquid hydrocarbons" by plants at Sneed, Texas, and Liberal, Kansas,[3] "is a separate business voluntarily embarked upon for profit and, therefore, the net revenues derived from such business should not be credited to the cost of service" (R. 125).[4]

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[2] *Hope Natural Gas Company* v. *Federal Power Commission*, 134 F. 2d 287, 307–308 (C.A. 4), reversed on other grounds, 320 U.S. 591; *Cities Service Gas Company* v. *Federal Power Commission*, 155 F. 2d 694, 703 (C.A. 10), certiorari denied, 329 U.S. 773.

[3] The Sneed plant is owned and operated by Phillips Petroleum Company which there extracts the liquids and returns the residue gas to Panhandle, and pays Panhandle prevailing market prices for 58% of the extracted liquids. Panhandle itself owns and operates the Liberal, Kansas, plant and sells the extracted liquids at prevailing market prices. R. 126.

[4] Compare the somewhat altered wording of petitioner's contention since 1956 (see *e.g.*, Pet. 14–15) that "the overwhelming percentage of the total hydrocarbon volumes extracted is superfluous [to the avoidance of condensation in the pipeline, and] is undertaken for the wholly separate and distinct business purpose of extracting, refining, processing and selling of hydrocarbons (R. 5–6, 48). Consequently, the hydrocarbon extraction over and above that which is desirable to improve the efficiency of the pipeline and which is incidental to pipeline operations, is beyond the Commission's jurisdiction to regulate. * * * Settled principles, accordingly, require that the costs allocable to the superfluous extraction be determined separately and the profits from such extraction not used to reduce the company's pipeline cost of service. * * *"

In that proceeding the Commission first decided "to treat the gasoline operations of Panhandle as a separate business or department" on a basis not urged by Panhandle, *i.e.*, "that the rates which we prescribe for the sale of natural gas for resale should not rest in part upon the fluctuating and unregulated prices of natural gasoline and other liquid hydrocarbons" (R. 127; footnote omitted). However, the Commission's order was set aside on judicial review. *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810 (C.A.D.C., decided December 15, 1955), certiorari denied, 352 U.S. 829 (October 8, 1956), rehearing denied, 352 U.S. 919 (November 19, 1956). The court held (so far as pertinent here) that the possibility of such fluctuations was not a valid basis for refusing to credit the extraction revenues (230 F. 2d at pp. 820–821). It, accordingly, remanded the G–1116 case.

Meanwhile hearings were being held in G–2506 on the increased rates that had superseded those in G–1116, and Panhandle again sought to avoid the crediting of net revenues from the Sneed and Liberal extraction operations.[5] After the court of appeals' December 15, 1955, decision in *City of Detroit,* Panhandle introduced further evidence in the G–2506 record on the extraction issue, attempting to demonstrate that Panhandle incurred joint costs "for two businesses, that is

[5] Panhandle introduced evidence to the effect that some of the extraction, which "is not necessary * * * is desirable to improve the operating efficiency of the lines", but "most of the extraction at Liberal and at Sneed must be characterized as superfluous because the extraction operations * * * are carried far beyond the point required to insure that liquid will not form in the transmission lines" (R. 13).

the natural gas business and the hydrocarbon extraction business" and that on an annual volumetric basis only a small portion of the Sneed and Liberal extraction benefited the pipeline operation (R. 5). Before that hearing was closed, the examiner gave Panhandle further opportunity to present any additional evidence it might deem necessary in light of the denial of certiorari and of rehearing in *City of Detroit* in October and November 1956 (R. 55, 167).

In April 1961 the Commission issued opinions in both G–2506 (R. 109–121) and the remanded G–1116 (R. 133–138). It concluded that the net revenues (after cost) from all of the Liberal and Sneed extraction operations should be credited against Panhandle's cost of service (R. 111–112):

> We agree with the presiding examiner that the evidence presented by Panhandle is not sufficient to overcome the court's holding that where the extraction of hydrocarbons improves the efficiency of and is incidental to the operation of Panhandle's transmission system, the revenues derived from such extractions should be credited to its cost of service. Panhandle's additional evidence confirms our earlier finding that the extraction operations do improve the efficiency of the pipeline and therefore clearly come within the rule laid down by the court. * * *

On review (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 305 F. 2d 763 (C.A.D.C.), certiorari denied, 372 U.S. 916) Panhandle argued that the Commission should not, in the circumstances, credit all of the net revenues from the Liberal and

Sneed extraction operation, but only that portion of the extraction business which improves the pipeline's efficiency (305 F. 2d at 767).[6] The court, concluding that Panhandle had furnished no persuasive support for its position, held that the Commission was not compelled to make an allocation (citing the cases in which the Commission, with judicial approval, had credited all of the net extraction revenues). It held, however, that the *City of Detroit* decision did not, on the other hand, compel the crediting of all net revenues whenever some of the extraction improved the efficiency of the pipeline. Accordingly, it left the "question of allocation as a matter within the Commission's reasonable discretion" (305 F. 2d at 768). It then expressed its "serious doubt in this case as to whether the Commission so understood the City of Detroit decision," stating (*ibid.*):

> * * * Indeed, there are strong indications that the Commission believed that City of Detroit requires, where extraction operations in some way improve the efficiency of a transmission system, that the entire extraction revenues be credited to the pipeline. [Footnote omitted.]

Accordingly, the court remanded both G–1116 and G–2506 to the Commission "to reach an independent determination, in light of our opinion in the City of

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[6] The court there said: "* * * Panhandle seems to claim (1) that extraction operations which improve pipeline efficiency must be treated as within the Commission's jurisdiction, while those that do not should be treated as non-jurisdictional, and (2) that when jurisdictional and non-jurisdictional operations use the same facilities, the operating cost of these facilities should be allocated between them. * * *

Detroit case, as to whether there should be an allocation of the extraction plant profits at Sneed and Liberal" (*ibid.*)

Following this remand, the Commission ruled that Panhandle had not only failed to provide a fair method of allocation of extraction costs and revenues between its pipeline and its claimed "separate" or "superfluous" extraction business, but had failed to show any basis "for determining that such other allocation would have been appropriate." R. 162–163.

The Commission's analysis of the evidence (R. 156–167, 183–185) showed that at 32° Fahrenheit, the lowest pipeline temperature experienced, the condensation of gasoline and other heavy hydrocarbons out of the natural gas in the line under a pressure of 600 pounds would make it beneficial to the operation of the line to maintain extraction operations at a rate that might well approximate 100 percent of the Sneed and Liberal plants' total capacity (R. 164). Not only had Panhandle thus failed to show that less than the entire capacity of the plants was beneficial to pipeline operation; in addition, there was no proof of variable extraction plant costs in any significant amount, and no basis for assuming that the operation of the plants for purposes not beneficial to the pipeline would increase operating costs substantially above what they would be if the plants were operated solely to benefit the pipeline (R. 165).[7]

[7] To Panhandle's contention that its stockholders "would have been required to bear the loss if the [gasoline] price had been so low that the revenues were less than the cost of carrying out the operation", the Commission answered (R. 166–167):

> * * * Panhandle's stockholders would have the risk of loss only if we agreed with its theory that the major

The Commission's orders also denied Panhandle's petition (R. 141–149), filed following the remand, for an opportunity to present additional evidence on the extraction issue, because there was "no clear indication that the evidence offered * * * would likely lead to a different result" (R. 168):

> The petition fails to specify what kind of evidence would be offered and fails to allege what Panhandle would show. Panhandle does not show how it plans to meet the requirements of the court's two opinions in its attempt to justify utilization of an allocation of extraction costs and revenues. * * *

Accordingly, the Commission ordered refund of the excesses collected between February 20, 1952, and August 31, 1958 (R. 185–186).

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portion of costs and revenues should be attributed to the excess liquids as a "separate business". Especially since its own witness admitted that the extraction operations should be carried on "even though you had to throw the [extracted] material away", and that the extraction costs "would have been a proper component of the cost of service" even "if the price of gasoline had been low", we cannot agree that the responsibility for these costs should be borne by the stockholders.

To agree with Panhandle would leave the stockholders responsible for the cost of maintaining essential pipeline operations, an obviously erroneous result. Since it is recognized that the necessary extraction should be undertaken even at a loss the pipeline phase of the business should be treated as responsible for the costs and corollary revenues attributable thereto. This would leave the stockholders with no risk of loss other than that involved in its normal opportunity to earn a regulated rate of return. [Footnote omitted.]

In its opinion denying rehearing, the Commission observed further (R. 185): "Panhandle's portrayal of its extraction operations as a 'business separate and distinct from the natural gas pipeline business' is not borne out by the facts."

On October 15, 1964, the Commission denied Panhandle's application for rehearing (which again sought a reopening) but granted stay of the refund requirement pending completion of court review (R. 182–186). In overruling that request the Commission observed (R. 183–184):

> * * * As Panhandle admits, the Commission brief in the previous appeal from Opinion No. 344 listed a number of areas of deficiency in Panhandle's proof. Yet, in its 1963 petition to reopen the record, Panhandle contented itself with the general statement (at p. 10) that it "stands ready to supply additional factual information regarding these two plants and will, in any event, present evidence to assist the Commission in arriving at a proper solution to their vexing problem." Now, after the issuance of Opinions 269–B and 344–A, which set forth the areas in which Panhandle's showing was deficient, Panhandle still does not attempt to describe, even in general terms, the nature of any of the evidence it might be in a position to introduce.

Panhandle's petition for review was argued before the same judges who had sat in the preceding case (305 F. 2d 763). On June 22, 1965, that court affirmed the Commission's order by a *per curiam* opinion "as within the Commission's authority validly exercised as a result of the proceedings upon the remand" (Pet. App. pp. 1a, 2a).

ARGUMENT

Panhandle had two hearings on rate increases at which it presented evidence to support its contention

as to its revenues from extraction plants—*i.e.*, that extraction of gasoline and other liquid hydrocarbons at the Sneed and Liberal plants from the natural gas Panhandle transports in interstate commerce is an operation in large measure independent of its transportation operations and to that extent not to be taken into account in fixing its rates for natural gas. After the first Commission decision (which was in Panhandle's favor) had been judicially set aside (*supra*, p. 4) and the second (which denied an allocation) had been remanded for further consideration by the Commission (*supra*, pp. 5–7), Panhandle petitioned for another opportunity to produce evidence. However, as the Commission pointed out in refusing to reopen, the petition did not specify what kind of additional evidence Panhandle proposed to offer (*supra*, p. 8). And when Panhandle repeated the request in its application for rehearing, it "still [did] not attempt to describe, even in general terms, the nature of any of the evidence it may be in a position to introduce" (*supra*, p. 9). We submit that in the absence of a "clear indication that" petitioner proposed to introduce evidence that "would likely lead to a different result," the Commission plainly did not abuse its discretion. *City of Detroit* v. *Federal Power Commission*, *supra*, 230 F. 2d at 822; cf. *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 514–519; 6 Moore's *Federal Practice* (2d ed.), pp. 3787–3790.

The Commission, upon a careful review of the evidence that was of record, found that "the pipeline phase of the business should be treated as responsible for the [extraction] costs and corollary revenues

attributable thereto", and "Panhandle's portrayal of its extraction operations as 'a business separate and distinct from the natural gas pipeline business' is not borne out by the facts" (*supra*, p. 8, n. 7). As its opinion discloses (R. 156–167), these findings were based principally on Panhandle's own evidence, and on testimony given by its principal engineering witness (see R. 13–50, particularly R. 45–46, 49–50). There is no claim that they are not adequately supported by the record. In view of this and Panhandle's failure to specify the nature of the supplementary proofs it would offer even after the deficiencies in its earlier request for a reopening had been pointed out (*supra*, p. 9), there is no warrant for its present attempt (Pet. 14–15) to reopen an essentially factual question before this Court.[8]

CONCLUSION

In sum, all that is now presented after protracted litigation is an attempt to question a refusal to reopen the record when the Commission, the trier of the facts, twice found that petitioner had given no adequate reason for reopening. Its ruling has been

[8] Nor is there basis for the suggestion (Pet. 10–13) that the Commission's decision was based on "newly-injected considerations" of which Panhandle did not have notice, and that Panhandle was therefore denied a fair hearing. From the beginning Panhandle has sought, in one way or another, to justify departure from the Commission's familiar method of treating extraction plant costs by attempting to show that it operates a separate business at Sneed and Liberal. The Commission's adherence to the established method rests simply upon its determination that Panhandle did not prove its point or show that further hearings might warrant a different conclusion.

reviewed and affirmed by the same court of appeals that had previously sent the case back to the Commission (supra, p. 9). Since the ruling turns entirely upon the particular facts of this case, there is neither conflict nor other reason for review by this Court. The petition should be denied.

Respectfully submitted.

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OCTOBER 1965.

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